

Before the
Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Advanced Television Systems)
and Their Impact upon the) MM Docket No. 87-268
Existing Television)
Broadcast Service)

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To: The Commission,

Petition

Caroline Powley, doing business as Unicorn Communications, licensee of WNGS-TV, Channel 62, Springville, New York, (the "Petitioner") hereby petitions the Commission to add WNGS to the DTV Table of Allotments, for the reasons as set forth below, and comments on the proposals made in the Sixth Further Notice of Rule Making.

ARGUMENT

In the Second Further Notice of Proposed Rule Making, 7 FCC Rcd 5376 (1992), the Commission proposed that the primary allotment objective would be to accommodate all eligible existing broadcasters with a second channel for DTV service, and the Commission defined eligible existing broadcasters to include, *inter alia*, permittees authorized as of October 24, 1991. WNGS filed its application for construction permit on October 29, 1991, and thereby missed the cut-off date by 5 days.

In discussing the Commission's decision to set the cut-off date in the Memorandum Opinion and Order/Third Further Notice of Proposed Rule Making, 7 FCC Rcd 6924 ("Third Further Notice"), at para. 8, the following justification was given for the selection of the date:

"In including the permittees and applicants, we avoid depriving parties who invested in television broadcasting before they had clear notice of our intent to phase out NTSC broadcasting at a future date, and to cease permitting broadcasts in NTSC. Parties applying for NTSC channels after the date of the Notice have done so with clear forewarning that they may not be

able to obtain an ATV channel to continue broadcasting after that point."

In the case of the Petitioner, virtually all of the expenditures and work required to complete the engineering report and fill out the application for construction permit was begun months before, and completed prior to, the date the Petitioner would have had clear notice of the intent of the Commission to phase out NTSC broadcasting. Prior to the filing of the application for construction permit the Petitioner was required to employ an engineer, have engineering studies performed and an engineering report completed, find and secure studio and antenna sites, obtain commitments for the capital and financing required, and hire legal counsel to prepare the application. All of this work was completed prior to October 24, 1991. Further, in any event, Petitioner did not have, nor could Petitioner reasonably have been able to obtain, actual notice of the Commission's actions regarding the phasing out of NTSC broadcasting prior to Petitioner's submission of its application on October 29, 1991. Therefore, Petitioner should be considered to be within the Commission's definition of "existing broadcasters" and should be allotted a DTV channel.

Further, the allotment of a DTV channel to Petitioner should not create an opening for many other NTSC stations, if any, to make a similar petition. In discussions with the Commission staff, the Petitioner understands that no other applications for a construction permit for a TV station were filed within one or two months of the Petitioner's application.

For the above reasons, the Petitioner hereby respectfully petitions the Commission to add WNGS-TV, Springville, New York, to the DTV Table of Allotments. As it is more likely than not that the proposed DTV Table of Allotments will change before becoming final, Petitioner will request that the Commission assign to the Petitioner an available channel, rather than requesting to be assigned a specific channel.

ALTERNATIVE

In the event the Commission is unwilling to grant Petitioner's petition submitted herein, Petitioner submits the following comment regarding the Commission's request for comments in its Sixth Further Notice of Proposed Rule Making, para. 51, regarding the use of vacant channels. The Commission's request for suggestions on how vacant channels should be allotted seems to ignore its statement in the Third Further Notice, at para. 9, providing that "...we will assign remaining ATV set-aside channels to parties who apply after October 24, 1991 for NTSC facilities and who are authorized to construct in the interim

period before initial ATV assignments are made." Petitioner feels strongly that the Commission should reaffirm this position. Not only is it a fair procedure to give priority for the assignment of vacant channels to existing broadcasters for the reasons set forth in Second Further Notice of Proposed Rule Making, 7 FCC Rcd 5376, but also when the Commission stated in the Third Further Notice that it intended to assign any remaining channel to those who had submitted applications after October 21, 1991, until the initial DTV assignments had been made, Petitioner relied upon this statement with respect to its conduct and its business in continuing to construct and operate its station. To change this position at this time would result in a gross inequity to Petitioner.

Therefore, notwithstanding any other use of the vacant channels, it seems only fair that priority for such vacant channels should be allotted to parties, such as Petitioner, who applied after October 24, 1991, with the party having the earlier date of filing having priority over other parties having later filing dates. Again, this would be consistent with Commission statements that the purpose of allocating DTV channels to existing broadcasters, with priority to those broadcasters who submitted their permits prior to having clear notice of the intent of the Commission to phase out NTSC broadcasting in the future, and is also consistent with the Commission's statement in the Third Further Notice, at para. 9, providing that "...we will assign remaining ATV set-aside channels to parties who apply after October 24, 1991 for NTSC facilities and who are authorized to construct in the interim period before initial ATV assignments are made."

Therefore, the Petitioner hereby requests that any remaining vacant channels be allotted first to parties who applied after October 24, 1991, with priority determined in accordance with the filing date for their applications, with highest priority going to the earliest filing date.

Respectfully submitted,

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